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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REHEARING IN RE: JOHN LEN LACY APPLYING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT:

FRANK J. LOONEY
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BEN F. ROBERTS
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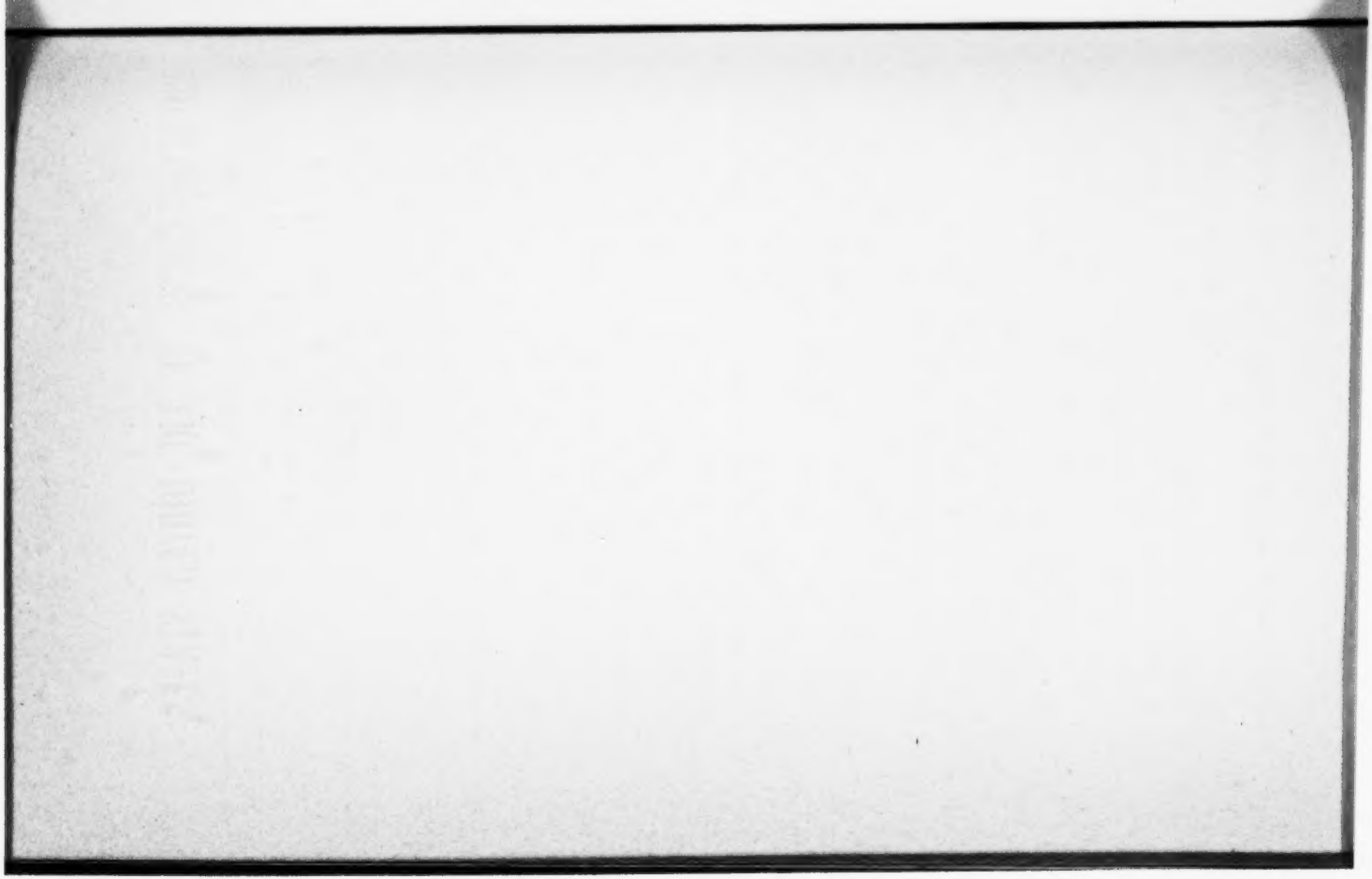

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Now comes petitioner in above numbered and entitled cause, and files this his motion for a rehearing, and a reversal of judgment denying his petition for certiorari, and alleges the following reasons:

1. The right to be indicted by a legal grand jury is one of the fundamental guarantees of the Constitution of the United States, when the charge is of an infamous crime.
2. A grand jury cannot function as a legal body when it is called and selected in a manner other than in strict compliance with the statutes enacted by Congress.

Petitioner shows that, whereas, Courts by virtue of their

existence must exercise certain power, and where there is no statute, United States District Court, as held in United States vs. Hill, F. C. 15 364, had the right to issue venire facias as under common law procedure, that the said Courts being of limited jurisdiction and powers are now permitted to have grand juries called only in compliance with the Acts of Congress, and particular United States Code, Title 28, Section 421.

Petitioner shows that said provision of the law, originally Judicial Code, Section 284 materially changed the pre-existing statute which read:

> "That no grand jury shall be summoned to attend any Circuit or District Courts unless one of the Judges of such Circuit Court, or the Judge of such district, in his own discretion, or upon a notification by the District Attorney that such jury will be needed, orders a venire to issue therefor, and either of said Courts may, in term time, order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever in its judgment it may be proper to do so." (United States Revised Statutes 810; Act 1846, 9 Statute at Large, 72, Section 3.)

In UNITED STATES VS. LACHER, 34 U. S. 624, 626, the Court said:

> "If there be any ambiguity in (specifying section) in-as-much as it is a section of the Revised Statutes, which are merely a compilation of the Statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law." (See Barnett vs. United States, 109 U. S. 218, 227).

Applying the doctrine announced in this decision, and comparing United States Revised Statutes 810 with the law, as it was originally written, and as it exists today, in Judicial Code, Section 284, we find:

> In the Judicial Code, after the word 'therefor' we have the insertion of the clause authorizing 'a second grand jury,' in the law as it now exists, an additional clause inserted providing for 'a third grand jury.'

The limited localities benefiting by these insertions being defined therein.

Confusion may have been caused by the continuance in the section of the following words:

> "And said Court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, wherever, in its judgment, it may be proper to do so."

Petitioner shows this does not authorize more than one grand jury at a time, a fact emphasized in the United States Attorney General's letter quoted in original brief attached to petition for certiorari, in the sentences:

> "During the Sixty-Ninth Congress this department recommended an amendment of Section 284, which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation."

Petitioner shows the construction of Section 284 is contrary to the present contention of the Government.

This construction is buttressed by the language of

Justice Nelson in United States vs. Reed, F. C. 16134 2 Blatchford 435:

> "The Act of 1846 changed the law as it then existed, but the obvious extent of that change, as designed by Congress, and as appears from the face of the law, was to remove the necessity that previously existed of summoning a grand jury at every term of the Circuit and District Courts, with a view to diminish expenses.

Thus it is made clear that the language of the law was to "diminish" not only expenses, but grand juries and not to increase them, and [redacted] to add "additional grand juries" is nowhere suggested.

The same limitation on the language of Revised Statutes 810, which is therein quoted is made in United States vs. Breece, 172 Fed. 765, 768, where it is said:

> "The evident purpose of this Statute was to prevent the unnecessary attendance of a grand jury, and the expense and trouble of the same, at a term when there was no need for a grand jury, and no business to be brought before it. If a grand jury is deemed unnecessary before the Court meets, and afterwards it is found that a grand jury is needed, the Court may, by order in term time direct that they be summoned."

In 1807 Chief Justice Marshall in Ex Parte Bollman, 4 Cranch 75, on page 93, began his opinion with these words:

> "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution, or by the laws of the United States******."
> "Courts which are created by written law, and whose

jurisdiction is defined by written law, cannot transcend that jurisdiction."

We respectfully request this Honorable Court to review the petition for certiorari, and the briefs filed herein, and to open for hearing this question which involves even more than the four freedoms, to-wit: That prized and primitive freedom from arrest and prosecution except in strict conformance with the requirements of the "written law."

WHEREFORE, petitioner prays that a rehearing be granted.

Respectfully submitted,

FRANK J. LOONEY,
Attorney for Petitioner.

Of Counsel:

Ben F. Roberts
J. Ralph Goff

I certify that this motion is made in good faith and not merely for the purpose of delay, this the 19th day of October, A. D. 1942.

FRANK J. LOONEY,
Attorney for Petitioner.